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CIVIL AND ?POLITICAL RIGHTS, INCLUDING QUESTIONS OF DISAPPEARANCES AND SUMMARY EXECUTIONS

Question of enforced or involuntary disappearances

Note by the secretariat

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* The annexes to the present document are reproduced in English only.

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* Issued in English only. The original versions of all comments are available for consultation in the files of the secretariat.

Note by the secretariat

1. In its resolution 1999/38 of 26 April 1999, the Commission on Human Rights requested the Secretary-General to renew the invitation to States, international organizations and non-governmental organizations to submit their views and comments on the draft international convention on the protection of all persons from enforced disappearance (E/CN.4/Sub.2/1998/19, annex) transmitted by the Sub-Commission in its resolution 1998/25 of 26 August 1998.

2. By note verbale dated 10 November 1999, the Secretary-General renewed the invitation to States, international organizations and non-governmental organizations to forward to the Office of the High Commissioner for Human Rights any information they would wish to provide on the draft international convention on the protection of all persons from enforced disappearance.

3. In its resolution 2000/37 of 20 April 2000, the Commission on Human Rights requested the Secretary-General to ensure the wide dissemination of the draft international convention on the protection of all persons from enforced disappearance, asking States, international organizations and non-governmental organizations to submit their views and comments, as a matter of priority, on the draft convention, on the follow-up thereto, and in particular, on whether an inter-sessional working group should be set up to consider the draft convention.

4. By two notes verbales, of 8 August 2000 and 31 August 2000, the Secretary-General renewed the request to States, international organizations and non-governmental organizations to submit their views and comments on these questions.

Annex I

COMMENTS AND INFORMATION PROVIDED BY STATES

In reply to these notes verbales, the Secretary-General received the following communications.

A. Argentina

[Original: Spanish]

By note verbale dated 2 October 2000, the Permanent Mission of Argentina to the United Nations Office at Geneva provided the secretariat with the following comments:

"The Argentine Republic supports the establishment of an inter-sessional working group to study the draft international convention on the protection of all persons from forced disappearance and believes that the draft provides a sound negotiating basis for formulating an international instrument on this subject.

Argentina is of the view that an international convention against forced disappearance would fill a legislative gap in the international system and would have a preventive effect in the process of eradicating this aberrant practice in various parts of the world.

By way of background information, it should be pointed out that Latin America has taken a fundamental step towards prosecuting persons accused of committing crimes against humanity by giving effect to the Inter-American Convention on Forced Disappearance of Persons. The draft Inter-American convention was negotiated for approximately 10 years, first in the Inter-American Commission on Human Rights and then in the Inter-American Juridical Committee of the Organization of American States (OAS). At these meetings the delegations of Chile and Argentina introduced the concept of crimes against humanity to cover this type of crime and the concept was included in the final draft adopted at the OAS General Assembly in Belém do Pará (Brazil) in June 1994.

In its preamble, the Inter-American Convention reaffirms that 'the systematic practice of the forced disappearance of persons constitutes a crime against humanity', and in its operative part provides for the possible situations relating to alleged perpetrators of such crimes. Thus, in article II it stipulates that 'for the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the State ... followed by an absence of information or a refusal to acknowledge the deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees'.

Article VI goes on to stipulate: 'When a State Party does not grant extradition, the case shall be submitted to its competent authorities as if the offence had been committed within its jurisdiction, for the purposes of investigation and, when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the State that has requested the extradition.'

On 13 September 1995, the Argentine Republic approved the Inter-American Convention on Forced Disappearance of Persons through Act No. 24.556, depositing the instrument of ratification with the Secretary-General of OAS on 28 February 1996.

Furthermore, in accordance with the procedure set forth in article 75, paragraph 22 (in fine), of the Argentine Constitution, the Inter-American Convention was accorded constitutional status under Act No. 24.820 of 30 April 1997, joining the 11 human rights instruments mentioned in that article which already had that status.

It should be noted that Argentina's reason for promoting the negotiation of the Inter-American Convention was linked to its painful national experience and, in particular, to the work performed by the National Commission on the Forced Disappearance of Persons (CONADEP), the prosecution of the military juntas and the investigations conducted by the Public Prosecutor's Office.

The Argentine Republic acknowledges the important work done by the Commission on Human Rights Working Group on Enforced or Involuntary Disappearances. However, it considers that, although the Working Group's activity has been very commendable, the growing number of reports of enforced disappearance highlights the urgent need for a legally binding international instrument to prevent and punish the practice, such as the text of the draft convention (E/CN.4/Sub.2/1998/19, annex).

Finally, we would like to recall that, following a proposal put forward by Costa Rica and supported by Argentina, the enforced disappearance of persons was also included among crimes against humanity in the context of the work of the Preparatory Commission for the Establishment of an International Criminal Court. The statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome in 1998, is at present half-way towards being approved by the Argentine National Congress."

B. Belarus

[Original: Russian]

By note verbale dated 28 December 1999, the Permanent Mission of the Republic of Belarus to the United Nations Office at Geneva provided the secretariat with the following comments:

"The law enforcement bodies of the Republic of Belarus regard one of their main tasks as being to protect citizens from criminal attacks and to ensure the guarantees of an individual's rights and freedoms. Particular importance is attached to examining cases of the disappearance of people.

In 1998 searches were mounted for 4,587 persons in the Republic. By the end of that same year, 892 people were still being sought. Over 11 months of 1999 there were 5,487 missing persons being looked for.

The procurators' offices of the Republic of Belarus keep under constant supervision the lawfulness of action taken by the internal affairs bodies on statements and reports of unexplained disappearances of citizens. In cases where there are reasons for believing that a missing person may have been the victim of a crime, a criminal file is opened and an investigation is carried out.

In 1998 the procurators' offices initiated 48 criminal cases relating to the unexplained disappearance of people, and the fate of the missing persons was established in 31 of those cases.

During 11 months of 1999 procurators of the Republic initiated 39 criminal cases. The fate of the missing persons was determined in 13 of those cases, and 22 criminal proceedings are under way.

Considering the importance of the problem in question, the new Code of Criminal Procedure of the Republic of Belarus, in force since 1 July 2000, provides (art. 167) that the fact of the disappearance of a person constitutes grounds for initiating a criminal case. It may be noted also that searches for missing persons and the investigation of criminal cases involving unexplained disappearances are subject to constant procuratorial supervision."

C. Chile

[Original: Spanish]

By note verbale dated 16 October 2000, the Permanent Mission of Chile to the United Nations provided the secretariat with the following information:

"With regard to the letter of the Office of the United Nations High Commissioner for Human Rights requesting opinions on the draft international convention on the protection of all persons from enforced disappearance (referred to below as 'the convention'), I have the honour to inform you that this Ministry does not have any objections in this regard. In general terms, the draft text is similar to that of the Inter-American Convention on Forced Disappearance of Persons, which is being sponsored by this Ministry and discussed in Parliament.

We believe that the approach and content of the draft convention are sound. However, there may be some objection in the National Congress to the provisions on jurisdiction and prescription (which differ from some of the provisions of the Inter-American Convention).

General content

(a) The provisions of the convention establish international obligations for the States parties to make the necessary changes in internal law to ensure full compliance with the agreements adopted.

The convention gives a definition of enforced disappearance that is similar to the one used in the Inter-American Convention on Forced Disappearance of Persons, but without the element relating to the lack of any possibility of applying for procedural remedies as a result of the disappearance and a refusal to supply information. This offence consists of the following elements:

The State must have participated in some way in the commission of the offence, i.e. because it was committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State;

The deprivation of liberty must have been followed by a lack of information or a refusal to acknowledge it or by a refusal to provide information on the fate or whereabouts of the person.

(b) The convention provides that the systematic or widespread practice of enforced disappearance of persons constitutes a crime against humanity and differentiates it from non-systematic enforced disappearance (the two are treated differently in some respects). The States parties undertake to adopt the legislative measures that may be needed to define systematic and non-systematic enforced disappearance as two separate offences and to impose an appropriate penalty which takes account of their extreme gravity (excluding the death penalty).

(c) The States parties also undertake, in particular:

Not to practise, permit or tolerate enforced disappearance;

To investigate immediately and promptly any complaint of enforced disappearance and to inform the family of the disappeared person;

To impose penalties, within their jurisdiction, for the offence of enforced disappearance of persons;

To cooperate with each other and with the United Nations to contribute to the prevention, investigation, punishment and eradication of the enforced disappearance of persons; and

To provide prompt and adequate compensation to the victims of these offences.

(d) On the basis of this convention, punishment should be imposed on:

The principal and other participants in the offence of enforced disappearance or any element thereof;

The principal and other participants in incitement, conspiracy or attempt to commit this offence or to conceal it;

Anyone who fails to fulfil the legal obligation to act to prevent the commission of this offence.

(e) The principles established by the convention are as follows:

Ongoing offence: the offence of enforced disappearance of persons shall be regarded as continuing and ongoing as long as the fate or whereabouts of the disappeared person has not been determined (it is not an offence which is committed instantaneously).

Mitigating circumstances: mitigating circumstances may be established for persons who, having participated in acts which constitute enforced disappearance, are instrumental in bringing the victim forward alive or in providing information which would shed light on the enforced disappearance of a person.

Classification of the offence: enforced disappearance shall not be regarded as a political offence for purposes of extradition (applicable in every extradition treaty entered into between States parties) or political asylum.

Non-applicability of statutory limitations: criminal proceedings arising from the offence of enforced disappearance and any penalty which is legally imposed on the person responsible therefor shall not be subject to the statute of limitations.

As an exception, ordinary (non-systematic) enforced disappearance shall be subject to the statute of limitations in accordance with the internal law of the States parties, but the maximum limitation shall be applied and it shall be counted only as from the time when the whereabouts or fate of those who have disappeared has been determined.

Due obedience: due obedience to orders or instructions from a superior may not be invoked as a justification. Any person receiving such orders shall have the right and the duty not to obey them.

Enforced disappearance committed by a subordinate shall not exempt his superiors from criminal responsibility if they failed to exercise their authority to prevent its commission or to put an end to it, provided that they were in possession of information that it was being or would be committed.

The convention provides that the States parties shall undertake to ensure that the training of law enforcement personnel and officials includes the necessary education regarding this offence.

Jurisdiction: enforced disappearance of persons shall be regarded as an offence in each State party, which shall therefore take measures to establish its jurisdiction in the following cases:

When the enforced disappearance or any of its constituent elements was committed in any territory under its jurisdiction;

When the alleged principal and other participants are in the State party, regardless of their nationality and that of the person who has disappeared;

The foregoing shall not preclude the exercise of jurisdiction by an international court;

When a State does not exercise its jurisdiction, it shall immediately notify other States of this fact.

Extradition: when a State party does not grant extradition or extradition is not requested, it shall bring the case before the competent authorities.

Military jurisdiction: the convention states that the persons alleged to have committed the offence of enforced disappearance may be tried only in the ordinary courts of law of each State, to the exclusion of any exceptional or special courts, particularly military courts.

Minors: States parties must punish the appropriation of children of disappeared persons or children born during their mother's enforced disappearance. In such cases, States parties have an obligation to find and identify the children, on the basis of the general principle that minors must be returned to their family of origin. States parties must also harmonize their adoption laws with a view to providing for the possibility of reviewing adoptions and, if necessary, annulling those resulting from an enforced disappearance.

(f) Other relevant provisions contained in the convention:

States parties undertake to provide for a special legal remedy as a means of rapidly determining the whereabouts of persons who have disappeared or identifying the participants in such offences.

Special regulations apply to deprivations of liberty in order to guarantee respect for fundamental human rights.

Without prejudice to the applicable international responsibilities, the State is held liable under civil law for enforced disappearances.

A United Nations committee against enforced disappearance is established and its composition, functioning, functions and powers are defined.

(g) The adoption of this convention will require a number of changes in Chilean legislation relating primarily to the characterization of enforced disappearance as an offence and to the legal rules applicable to its prosecution:

Penal Code: as to the characterization of enforced disappearance as an offence, it must be understood that it is a continuing or ongoing offence as long as: the fate of the victim has not been determined; a penalty commensurate with its extreme seriousness has not been imposed; it has not been differentiated from enforced disappearance not involving a systematic State practice; a special system for mitigating circumstances has not been set up for anyone who provides information to save the life or identify the whereabouts of the person in detention; and the non-applicability of statutory limitations to this category of offence has not been established.

Code of Military Justice and Administrative Statute, Act No. 18,834: the jurisdiction of these courts to try this offence is ruled out; the due obedience exemption is not applicable to this type of offence; and it is an obligation for superiors to exercise their authority in order to prevent such offences.

Code of Criminal Procedure: for the purposes of extradition, enforced disappearance is not to be regarded as a political offence and, where extradition is not granted, the offence must be tried in national courts.

Courts Organization Code: the convention indicates that each State determines the way in which it exercises its jurisdiction in these cases.

Constitutional Organization Act on States of Emergency: according to the convention, exceptional circumstances may in no case be invoked as a justification of the enforced disappearance of persons; speedy judicial remedies must exist to determine the whereabouts of persons deprived of their liberty.

It should also be pointed out this Ministry is at present carrying out the relevant studies with a view to incorporating this international instrument in internal law. A bill to amend the Penal Code will be required for this purpose."

D. Croatia

[Original: English]

The secretariat received the following comments from the Ministry of Foreign Affairs of the Republic of Croatia, transmitted by note verbale dated 18 January 2000 by the Permanent Mission of the Republic of Croatia to the United Nations Office at Geneva:

"Forced disappearances are regulated in the Croatian Criminal Law, chapter XI, under the section on criminal acts against human and civil rights and freedoms

(article 125 - kidnapping). The said article on kidnapping provides for imprisonment of six months to five years for the acts of unlawful custody, imprisonment or other deprivation or limitation of the freedom of movement.

A more serious form of this act is punishable by a prison sentence of from 1 to 10 years if committed on a child or an underage person or if accompanied by a threat of death or heavy injury, or if committed within a gang or a criminal organization. The law provides for exoneration if the hostage is voluntary released before the perpetrator's demands have been fulfilled.

In their work the police deal with a small number of kidnaps. Thus in 1997 only 12 such cases were recorded, with charges brought against 29 persons. In 1998 charges were brought against 32 persons suspected of committing 20 kidnaps.

Unlike the early wartime period when such criminal acts were motivated by ethnic or religious hatred and intolerance, since the end of 1992 such acts have been largely committed for criminal reasons or by persons with mental disorders, mostly involving blackmail, forcible debt settlement, mutual showdowns and the like.

Except for property damage caused in some cases, the victims have not been seriously harmed. In dealing with and preventing such crimes, the police pay special attention to the safety of the persons affected and for this reason employ units specialized in handling hostage and similar crisis situations."

E. Germany

[Original: English]

On 11 February 2000, by note verbale No. 40/2000, the Permanent Mission of Germany transmitted the following comments to the United Nations Office at Geneva:

"I. Overall assessment

The current draft convention takes account of and accommodates the concerns voiced by Germany in 1991, for example in the much more precise definition of forced disappearance in article 1. But the further development of the definition of 'enforced disappearance of persons' in connection with article 7 (1) (i) and (2) (i) of the Statute of the International Criminal Court also ought to be taken into account here.

Nevertheless even the amended version contains numerous articles to which Germany cannot subscribe as they would require unconstitutional amendments to the law or would be contrary to the fundamental principles of German law.

Moreover, there are still general doubts about the whole point of the planned convention, as forced disappearance is already inadmissible in all States and it is questionable whether an additional international commitment to prohibit forced disappearance can actually improve the situation.

II. Individual points

(a) Article 1

There are no reservations as to the defined offence of forced disappearance constituting a crime of intention. However, at least according to the wording used, it also seems to be possible for it to be a crime of negligence. This possibility should be excluded. The question as to how long information about the fate of the disappeared person has to be lacking to constitute an offence remains open.

(b) Article 2

The term 'participants' in article 2 (1) and at other points in the draft is difficult to reconcile with German law, which knows either perpetration or participation as referred to in article 2 (1) (a) and (1) (b).

Germany thus proposes simply using the term 'perpetrators' in these articles and deleting 'participants'.

The scope of participation in article 2 (1) is much too broad if, for example, participation in just one element of the offence defined in article 1 is to be made punishable. Participation needs to be limited to elements of the offence constituting a comparable degree of injustice. The fact that the participant knew or ought to have known about the perpetration of the principal offence cannot alone be enough to establish the intent to instigate or be an accomplice. Intentional action ought to be a prerequisite for participation.

In article 2 (2) it is neither clear for whom the legal duty to act to prevent is to exist, nor how the obligation has to be fulfilled. An 'everyman's duty' which in addition refers to an indefinite number of offences extends criminal liability in an unacceptable fashion.

(c) Article 5

Insofar as the States Parties are called upon to impose an appropriate punishment commensurate with the extreme gravity of the offence, they should be given sufficient scope to devise their own solutions. For example, under German law article 239 of the Criminal Code (deprivation of liberty) is a misdemeanour not a felony.

(d) Article 7

Measures under article 7 (1) are only permissible if the State authorities are competent to prosecute. The convention itself cannot establish such competence.

(e) Article 8

Some of the areas of cooperation listed in paragraph 2 come within the ambit of national investigation procedures or the averting of danger, rather than international legal aid in

criminal matters. There are therefore other prerequisites to be fulfilled in each particular case. This ought to be made clear by inserting a phrase such as 'the greatest possible measures of legal assistance'.

(f) Article 10

Article 10 (2) ought to refer not just to the immunities granted by the Vienna Convention on Diplomatic Relations but also to the immunity of members of parliament.

Germany rejects the broad legal standing of interested persons, as well as of national and international organizations, as envisaged in article 10 (4). Paragraph 4 ought to be deleted as it interferes too much in the law of criminal procedure of the States parties.

(g) Article 11

Germany cannot subscribe to this article as the organs of criminal prosecution, although independent from political powers, are part of the executive. Germany thus proposes deleting the words 'and independent'.

Mandatory access of criminal prosecution organs to all documents without exception, as envisaged in article 11 (3), is not possible. The last sentence of article 11 (3) should therefore be deleted.

Neither German law of criminal procedure nor presumably the law of averting danger grants such a comprehensive right of access as laid down in article 11 (4), irrespective of national security interests. This is also true of article 20 (2) and article 21 (6).

Such a far-reaching duty to furnish information as contained in article 11 (6) is not possible on data protection grounds.

Germany cannot accept the aforementioned provisions as they stand.

(h) Article 12

Article 12 concerning the extradition of persons charged with forced disappearance under the convention is not compatible with the Basic Law as far as the extradition of German nationals is concerned. Following the amendment to article 16 (2) of the Basic Law planned in connection with the ratification of the Statute of the International Criminal Court, it will only be possible to extradite German citizens within the European Union or if they are being transferred to an international court. The general obligation to extradite laid down in the aforementioned article is thus not possible for Germany.

Germany proposes exempting one's own nationals explicitly from the extradition obligation in article 13.

There are reservations about article 12 (2) and (3) as the bilateral extradition treaties and the multilateral conventions are not concerned with the offences as such but with the

envisaged punishment. This solution based on the resulting punishment is in principle preferable to a solution geared to the nature of a crime. Germany cannot therefore commit itself to this article as it stands.

(i) Article 13

Cases in which there is no request for extradition cannot establish jurisdiction. This is unnecessary, too. The phrase 'or is not requested to do so' should thus be deleted.

(j) Germany cannot accept article 14 because of the basic right of asylum in Germany anchored in article 16 (a) of the Basic Law. If the independent authorities and/or the courts grant asylum in Germany, the Federal Government has no political scope to transfer accused persons as called for in the draft convention.

Article 14 sentence 2 suggests an individual may be deemed unworthy of asylum. This is a concept alien to German asylum law.

Asylum law questions are not related to the issue of forced disappearance. Germany therefore suggests that article 14 of the draft convention be deleted.

(k) Germany cannot accept article 15 of the draft convention. Under article 15 (1) of the draft convention, no State party shall expel, deport, return or extradite a person to another State if there are grounds for believing that he/she would be in danger of being subjected to forced disappearance or any other serious human rights violation in that State. Under paragraph 2, the competent authorities, when determining whether such grounds exist, also have to take into account whether a pattern of gross, systematic or widespread violation of human rights is known to exist in the State concerned. We believe that only people whose life, limb or liberty is in concrete danger ought to be protected from deportation. The abstract danger of serious human rights violations should not suffice. Moreover the rights protecting a person from deportation ought to be limited to danger to life, health and liberty.

Also the issue of repatriation/deportation does not belong in the system of a convention against forced disappearance. Article 15 should thus be deleted.

(l) Article 16

The statute of limitations ought to be dependent on the envisaged punishment. The non-limitation provision in paragraph 1 ought to be deleted. The statute of limitations for the prosecution of criminal offences ought to start on completion of the offence. Establishing other starting points ('starting from the moment') breeds uncertainty.

(m) Article 18 (4)

The falsification or suppression of documents, as well as causing the recording of false declarations, is included in all criminal law systems. Further regulations seem unnecessary. The relevant phrase in paragraph 4 should thus be deleted, perhaps even paragraph 4 in its entirety.

(n) Article 21

Those subject to the obligation to provide information have to be more carefully defined. Withholding information can only be a punishable offence under paragraph 1 if statutory obligations to provide information are contravened. It is conceivable that it is not at all in the interests of a prisoner awaiting trial, who has to be presumed innocent, if his detention is made known to third parties, in particular to avoid the associated stigma effect.

The term 'competent authorities' in paragraph 6 is imprecise. It is a matter of course that access rights have to be granted to persons who are entitled or obliged to visit prisoners or penal institutions for constitutional or professional reasons (for example members of petitions committees, judicial staff or criminal police). Who else will be granted access needs to be specified.

(o) Article 22

Germany cannot support the obligation laid down in article 22 for States parties to maintain and publish centralized registers of detained persons, as this would be impossible to implement under German constitutional law. On the one hand, making available information on detained persons is contrary to the constitutionally recognized right to informational self-determination, which also includes data protection aspects. On the other hand, Germany's federal system means that administration of justice and matters concerning the deportation of persons without residence rights in Germany are dealt with at Land level. The German Government does not therefore have the information required under article 22 at its disposal and cannot compel the Länder to provide such information against their will.

The legitimate interest referred to in paragraph 2 must be made more specific. It has to be taken into account that a prisoner awaiting trial may want to avoid the fact of his imprisonment becoming general knowledge and has a legitimate interest in doing so.

(p) Article 24

There are grave concerns about the wording of article 24 of the draft. On the one hand, the provision clearly wants to go beyond a general declaration of intent and impose an obligation upon States to define specific claims that victims can make. This is evident from article 4 of the draft convention, which obliges the States to provide prompt and appropriate reparation for the damage caused to the victims of a forced disappearance in accordance with article 24.

On the other hand, the provision is still too general and vague for the States concerned to be able to recognize which individual claims they have to accommodate and how far their obligations stretch.

There are no reservations about the restitution of goods illegally taken and the reparation for the harm done as a result of an illegal attack on strictly personal rights such as life.

health, freedom, property or other absolute rights. However individual legal systems have set different parameters for what can be recognized as damage which can be compensated. To take account of the differences between the national legal systems, a sentence should be added which allow claims under the convention only to be made within the general law on civil liability of national legal systems. Article 24 (2) should be supplemented as follows: 'insofar as permitted by the general law on civil liability of the competent court'.

It remains largely unclear what is meant by rehabilitation, satisfaction and the restoration of the honour of the victims. While claims for damages are directed at the perpetrator himself, this probably involves claims against the State.

Finally, it is also unclear what the restoration of honour and reputation involves. Again, this seems to be a claim against the State. It is difficult to imagine what the State can do in concrete terms. A 'moral rehabilitation' is already involved in the criminal conviction of the offender, meaning there is no real need for a separate rehabilitation under civil law. This passage should thus be deleted.

The definition of rightful claimants is far too broad. Under article 24 (3), the victims are not just the disappeared person but also his or her relatives, any dependant who has a direct relationship with her or him and anyone who has suffered harm through trying to shed light on the whereabouts of the disappeared person.

The term 'dependant who has a direct relationship with her or him' is unclear and should be deleted. If people have been injured themselves when searching for the disappeared person they have their own claim for damages, so it is unnecessary for their claim to be pegged on to that of the disappeared person."

F. Guatemala

[Original: Spanish]

By note verbale dated 25 October 2000 the Permanent Mission of Guatemala to the United Nations Office at Geneva transmitted the following comments and observations:

"The State of Guatemala, pursuant to its democratic process and respect for human rights, has undertaken, as government policy, to continue to strengthen its international human rights protection systems with a view to promoting respect for the dignity of human beings under the jurisdiction of States.

To that end, Guatemala endorsed the basic principles of the Inter-American Convention on the Forced Disappearance of Persons, in which it is expressly stated that this despicable practice constitutes an offence against the dignity of the human being. On 28 March 1996, that Convention was approved by Decree 18-96 of the Congress of the Republic, and the instrument of ratification was deposited on 25 January 2000.

In this connection, please find below comments on the text of the draft international convention on the protection of all persons from forced disappearance.

Conceptualization:

Article 1

We think that the definition of forced disappearance should contain the same elements as the Inter-American Convention on the Forced Disappearance of Persons (art. 2), with the addition of the phrase, 'thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees'.

Punishment:

Article 2

This article adds another element to the category of forced disappearance: the situation where the perpetrator knew or ought to have known that the offence was about to be or was in the process of being committed. This factor is part of the theory of characterization or guilt (depending on whether the theory of cause or intention is used), which ought not to constitute a condition for punishment of the offence. The text should be reworded.

Investigation:

Article 4

This article should include the State party's obligation to publicize the offence and its investigation and prosecution, and the victim's right to be kept informed of the same.

Mitigating circumstances:

Article 5

Paragraph 2 of this article establishes the mitigating circumstances of the crime; consideration should be given to the mitigating circumstances set forth in each State's domestic legislation.

Responsibility

Access:

Article 11

Mention should be made of access to places where it is suspected that a disappeared person is to be found, and the guarantees of compulsory observance of domestic remedies, without undue formalities, given the nature of the offence.

Reparation:

Article 24

In paragraph 2 of this article, the content of the reparation should be revised inasmuch as, in accordance with studies by United Nations experts on the subject of reparations (Theo van Boven, Cherif Bassouni and Louis Joinet). reparation includes restitution (restoration of the victims' dignity); rehabilitation; compensation, which should cover damage arising (damnum emergens), lost profits, moral damage and life expectancy; as well as satisfaction and guarantees that the offence would not be repeated, which are fundamental aspects of reparation.

Paragraph 3 of the same article mixes together the victims and the beneficiaries of the reparation. The category of victim should cover the disappeared person and his or her next of kin, who suffer moral and psychological damage as a result of the act. The beneficiary category should include the victims, their heirs, third parties who were dependent on the disappeared person and fulfilled the requirements for receiving a regular contribution and who would presumably continue to do so if the disappearance had not occurred, thus improving their economic situation.

The committee:

Article 25, paragraph 4, of the draft convention provides for the participation of members of non-governmental organizations that enjoy consultative status with the Economic and Social Council. If it were possible, the invitation should be open to each State party's non-governmental organizations, not necessarily internationally recognized, in order to expand the coverage of nationally recognized organizations, leaving the invitation for membership to each member State.

Procedure:

Article 30 of the draft convention does not envisage the option of a friendly settlement. That measure would preclude international responsibility by recognizing national responsibility, giving States a means of defence. Friendly settlements have also yielded positive results in other human rights protection systems.

Some aspects of article 31 of the draft should be revised: paragraph 2 deals with aspects already covered in article 30 (2). Also, the final paragraph of article 31 contradicts article 30 (4) (b)."

G. Kuwait

[Original: Arabic]

By note verbale dated 1 May 2000, the Permanent Mission of the State of Kuwait to the United Nations Office at Geneva provided the secretariat with the following comments:

"(a) Article 5, paragraph 1

This article contains a provision which prohibits imposition of the death penalty on perpetrators of the offence of forced disappearance.

Regardless of the appropriate punishments that States Parties might see fit to prescribe for this offence, the death penalty is a lawful punishment in some States. Consequently, the Kuwaiti authorities propose that the expression 'The death penalty shall not be imposed in any circumstances' be deleted from article 5, paragraph 1.

(b) Article 25, paragraph 4

Article 25, paragraph 4, stipulates that the Secretary-General of the United Nations shall submit a list of the persons nominated for membership of the Committee against Forced Disappearance to the States parties, the relevant intergovernmental organizations and the relevant non-governmental organizations that enjoy consultative status with the Economic and Social Council.

In view of the fact that, under the terms of paragraph 3 of this article, the States parties to the said convention are the only ones entitled to elect the members of the Committee against Forced Disappearance, there is no evident reason to submit a list containing the names of the persons nominated for membership of the said committee to intergovernmental and non-governmental organizations.

Accordingly, the Kuwaiti authorities propose that the expression 'the relevant intergovernmental organizations and the relevant non-governmental organizations that enjoy consultative status with the Economic and Social Council' at the end of paragraph 4 should be deleted.

(c) Articles 29 and 30

The Kuwaiti authorities would like to know the reason why these two articles do not contain a provision stipulating that they apply only to States parties which declare that they recognize the competence of the Committee, as specified in those two articles, following the pattern set in similar conventions.

(d) The draft convention does not contain any provision concerning the settlement of disputes that might arise between States parties concerning the interpretation or implementation of the convention as is the case in some other international conventions relating to human rights. The Kuwaiti authorities therefore propose that an article dealing with this question should be added to the draft convention.

(e) The Kuwaiti authorities also wish to make the following comments on the Arabic text:

(i) Although the term 'offence' is translated into Arabic as 'jarima', which is the term used in the Declaration on the Protection of All Persons from Enforced Disappearance of 1992 and also in this draft convention, it is noteworthy that, in the following provisions of the Arabic version of the draft convention, the term 'offence' is translated as 'jinaya':

The first line of the third preambular paragraph;

The third line of paragraph 1 and the fourth line of article 5, paragraph 2;

The second and fifth lines of article 16, paragraph 2;

Article 17, paragraph 2;

The last line of article 18, paragraph 4;

Accordingly, the Kuwaiti authorities propose that, in the above-mentioned paragraphs, the term 'jinaya' should be deleted and replaced by the term 'jarima'.

(ii) The translation of the expression 'or of any constituent element of the offence' in article 2 as 'ayyi fi' lin yushakkilu ruknan min arkan hadhihi-l-jarima' conveys an ambiguous meaning, particularly as the term 'rukn' is used in Arabic to refer to the material or moral elements in the absence of which the act does not constitute a punishable offence. The Kuwaiti authorities therefore propose that the expression contained in the English version of the above-mentioned paragraph should be translated as 'ayyi fi' lin mukawwinin lil jarima'(any act constituting the offence), so that article 2, paragraph 1 would read as follows [translated from Arabic]: 'The perpetrator of and other participants in the offence of forced disappearance or of any act constituting the offence as defined in article 1 of this convention, shall be punished. The perpetrators or other participants in an act constituting an offence as defined in article 1 of this convention ... etc.'

(iii) In article 22, paragraph 5, the word 'qa' imaat' is used instead of the more correct plural 'qawa' im'."

H. Portugal

[Original: French]

The Permanent Mission of Portugal to the United Nations Office at Geneva transmitted the following comments by note verbale dated 22 October 2000:

"Regarding the suggestions submitted by the International Commission of Jurists on the draft international convention on the protection of all persons from enforced disappearance, Portugal made some not unfavourable comments on the draft international convention, pursuant to Commission on Human Rights resolution 1999/38. It made the same observations under paragraph 9 of Commission resolution 2000/37.

There seems to be no immediate objection to the convening of a meeting to consider the content of the draft convention, nor to the setting up of an inter-sessional working group to consider the convention, subject to conditions agreed upon at the meeting.

Regarding paragraph 9 of Commission on Human Rights resolution 2000/37, Portugal made a number of comments regarding Commission on Human Rights resolution 1999/38 on the question of enforced or involuntary disappearances. It concluded that Portuguese legislation and the draft convention were not incompatible and that the draft convention contained a set of extremely valuable provisions. Given that the draft convention has not been amended since then, Portugal makes the same observations pursuant to Commission on Human Rights resolution 2000/37 (para. 9).

The question:

The United Nations Secretary-General has asked all Member States to submit their comments on Commission resolution 1999/38. In this resolution, the Commission highlights the problems presented by enforced or involuntary disappearances not only for the victims themselves but also for their families and, in particular, children. It urges States to participate in the activities of the Working Group on Enforced or Involuntary Disappearances; it expresses its gratitude for any assistance that Governments may have provided and invites them to take legislative, administrative and other steps on the domestic front in order to combat the practice of enforced or involuntary disappearances. Furthermore, it asks States to submit their views on the draft international convention on the protection of all persons from enforced disappearance.

These points appear to be quite broadly established. No State which defends human rights is likely to disagree with them. The best way to respond to the Secretary-General's request would seem to be to express an opinion, however brief and concise, on the draft convention.

However, it should be stressed that the independence of the courts and the autonomy of the government procurator's office are guaranteed under Portuguese law, thus avoiding any confusion between the political branch and the Judiciary, that recent legislation provides for the protection of witnesses in criminal proceedings (Law No. 93/99 of 14 July) and that abduction is severely punishable under the Penal Code (which contains provisions on crimes against personal liberty under articles 153 et seq., abduction under article 160 and hostage-taking under article 161). The Portuguese Constitution, Judiciary, legal and penal systems strongly condemn enforced disappearances and, given the existence of the rule of law, it may be said that the problem does not exist in Portugal.

The draft convention

Introductory provisions:

The draft convention gives a general description of enforced disappearances, which, in paragraph 5 of the preamble, are said to constitute a crime against humanity. The situation during armed conflicts as well as in times of peace is provided for (para. 8), a strong link is established between enforced disappearances and torture (paras. 10 and 11), and disappearances brought about by agents of the State or persons acting with the authorization of the State are covered in paragraph 11.

It should be noted that General Assembly resolutions 47/133 of 18 December 1992 and 53/150 of 10 March 1999 distinguish between enforced disappearances brought about by the State and those perpetrated by persons unconnected with the State. This distinction is taken up in article 1, which defines enforced disappearance as a disappearance brought about either directly or indirectly by the State but does not exclude punishment for enforced disappearances 'other than those referred to in paragraph 1'.

The draft convention is divided into three main parts: Part I, the operative part; Part II, concerning the functioning of the Committee against Forced Disappearance and complaint mechanisms; and Part III, concerning entry into force, signatures and ratification.

Operative part:

(a) Definition

Article 1, paragraph 1, defines enforced or involuntary disappearance as:

> The deprivation of a person's liberty,
>
> Brought about by agents of the State or with the State's authorization,
>
> Followed by an absence of information or concealment of the fate of the disappeared person.

Thus, enforced or involuntary disappearances, for the purposes of the convention, are always those which are linked to a State, even though this link becomes tenuous, particularly at the stage of punishing the agent, because at this point, the perpetrator is not associated with the State on behalf of which he acted.

(b) Criminal law

The draft convention is very close to criminal law, particularly when, in article 2, it provides for the punishment of the perpetrator, as well as any participants and accomplices; when it provides for the punishment of an offence and an attempted offence

and when it also provides punishment for non-fulfilment of legal duty (non-fulfilment of legal duty to act to prevent offences, including enforced disappearances, as stipulated in article 10 of the Portuguese Penal Code (Decree-Law No. 48/95 of 15 March).

Of all the United Nations human rights conventions, this convention may be the most advanced in terms of the nature of its provisions, its decision-making methods and its punishments (the criteria for which are left for States to decide, even though when the Convention defines the massive practice of enforced disappearances as a crime against humanity, it suggests conferring jurisdiction on the International Criminal Court when the Rome Convention comes into force, or on another international tribunal, such as those already in existence for Rwanda and for the former Yugoslavia or that could be established in connection with another specific problem arising in the future).

(c) Renouncing the practice of enforced disappearances

Pursuant to article 4, States ratifying the convention assume an important undertaking to stop the practice of enforced disappearance and to renounce it in future.

Article 5 prohibits the application of the death penalty to the person responsible for an enforced disappearance. The Constitution of Portugal likewise prohibits the use of the death penalty (art. 24, 'Right to life', para. 2, 'in no case shall the death penalty be applied').

(d) International judicial cooperation

Article 8 provides for international judicial cooperation between States in connection with the offence of enforced disappearance, in order to make it as easy as possible to bring the perpetrator of such disappearances to trial. This should be read in conjunction with article 12, 'Forced disappearance shall not be considered a political offence for purposes of extradition', and the agent must be extradited if a request for extradition is made. If such a request is not made, legal proceedings shall take place in the State where the agent is arrested (art. 13). Lastly, political asylum is not to be granted to the perpetrator of an enforced disappearance (art. 14).

Portuguese law is consistent with these provisions. Pursuant to article 7, paragraph 2, of Law No. 144/99, of 31 August, crimes against humanity are not considered political crimes. Portugal would therefore extradite any perpetrator of such crimes found in Portuguese territory if a request for extradition was made.

It is clear that these provisions have great contemporary relevance. They are reminiscent of the efforts that have been made, and are still being made, to establish an International Criminal Court; of the definition, which corresponds to the general principles of international public law, of crimes against humanity and the need for them to be punished (see Kai Ambos, Völkerrechtliche Bestrafungspflichten, who concludes that there is a duty to punish resulting from these general principles); and of a case involving a request for extradition for crimes against humanity, including enforced disappearances, namely, the Pinochet case.

It should be noted that no statutory limitation shall apply to criminal proceedings concerning these crimes (art. 16) and that perpetrators shall not be allowed to benefit from amnesty (art. 17).

(e) Victims' guarantees

With regard to victims' guarantees, attention is drawn to the provisions of article 9 (that the order of a superior authority may not be invoked to justify an enforced disappearance, which means that it is no longer possible to apply the well-known criteria of Claus Roxin, the German criminal jurist, who proposed, with regard to the crimes against humanity committed between 1939 and 1945, that whoever was responsible for giving the order should be sought in order to punish the 'true' agent of a given crime; this approach which, as we have seen, does not exclude the person giving the order committing an offence, does in fact seem to correspond to a recent trend which consists in punishing agents for their share of the responsibility and appears to make good sense in the light of the fact that whoever carries out an order may also commit abuses and later attribute them to the order given) and to article 10.

Under article 10, the establishment of courts of special jurisdiction is forbidden: victims of possible enforced disappearances may not be tried in courts which lie outside the normal legal system. This provision is another indication that such an interpretation should inform the reading of those provisions of the convention which may seem ambiguous, in other words, that all the acts constituting an enforced disappearance are punishable: detention by agents acting on some kind of order from the State, trial by a court of special jurisdiction lying outside the ordinary legal system, acts of torture carried out on the detainee, his murder, possibly disguised as a death sentence carried out as a result of improbable legal proceedings of questionable fairness and impartiality, and so on.

Another guarantee, consistent with the principle of forbidding cruel, inhuman or degrading treatment, is contained in article 15 of the convention: the risk of enforced disappearance is enough to prevent expulsion or forced return to a country considered to be unsafe in this regard.

The provisions of Portuguese law prohibiting extradition in cases of this sort deserve specific mention. Article 6 of Law No. 144/99, of 31 August, defines the circumstances in which extradition may be refused. Such circumstances include the death penalty, life imprisonment and other serious sentences, although the existence of such sentences does not necessarily prevent extradition to the countries in question if the requesting State gives an undertaking not to apply them.

An extradition request may also be refused when it is made in connection with a political offence as defined by Portuguese law, or with a military crime not provided for under ordinary criminal law. Aut dedere, aut judicare ...

We can therefore conclude that the Portuguese legal system is consistent with the important guarantees provided by the convention.

The draft convention also contains provisions concerning the enforced disappearance of children and efforts made by States parties to identify, search for and locate the child, guaranteeing the return of minors to a State other than that in which they have been detained.

A series of provisions relate to the training of public officials, the existence of a prompt judicial remedy as a means of determining the situation of the victim, the States parties' rigorous determination of their laws regarding the deprivation of liberty, judicial guarantees of all kinds, such as application for habeas corpus and the continuous presence of a judge throughout proceedings, the definition of the conditions and rules of release and compensation for the victims of enforced disappearances (arts. 19-24).

With regard to Part I of the convention, which we have called the operative part, Portugal, through its constitutional, legal, judicial and penal provisions, offers all the necessary guarantees to prevent enforced disappearances in the territory under its jurisdiction and is in a position to support the draft convention.

Complaint mechanisms:

Like other human rights instruments, the convention establishes a committee (arts. 25 et seq.), and a system under which States parties submit reports, with the committee being authorized to receive relevant information from any persons or bodies (art. 28) and to decide to make inquiries or visits to the State concerned. Other States parties may submit complaints regarding the State in question, as may any person or group of persons, as stipulated in article 30.

Under article 31, the Committee may, on its own initiative, undertake any effective procedure to seek and find disappeared persons. It may also do so at the request of a State party, an individual, a group of individuals or a non-governmental organization.

It should be pointed out - and in this respect the convention breaks new ground - that no declarations are required from States parties to recognize the committee's competence, which derives from the convention and not from the States parties' recognition of existing complaint mechanisms. Consequently, reservations 'the effect of which would inhibit the operation of any of the bodies established by this convention' are not permitted (art. 36).

Without wishing to comment on the next phase in the elaboration and adoption of this convention, we can say that at this stage Portugal would be in a position to support it.

Since the mechanisms involved are identical to those of other conventions, and since reservations are not permitted, we will not deal in detail with Part III of the Convention (entry into force, signatures and ratification).

Conclusions:

The convention is still only a draft. There is still a long way to go before it is adopted. It is a convention which should be extremely valuable in the context of the numerous conflicts occurring throughout the world. It constitutes part of a modern framework for international criminal law and will probably be very effective in conjunction with the new International Criminal Court. It will form a set of rules concerning the practice of enforced disappearance and mark a step forward, particularly in terms of the powers of the committee, in relation to other conventions, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which does not provide for visits to prisons without prior consent and which, like all the other conventions, requires declarations to be made before competence is attributed.

For all the above reasons, this convention seems to be an extremely valuable one."

I. Qatar

[Original: English]

The Permanent Mission of the State of Qatar to the United Nations at Geneva informed the secretariat, by note verbale dated 15 December 1999, that it had no comments or any information on matters relating to the draft convention.

Annex II

COMMENTS PROVIDED BY THE WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES

[Original: English]

The Working Group on Enforced or Involuntary Disappearances, having met in New York in its sixtieth session from 24 to 27 April 2000, adopted the following comments:

"The Working Group welcomes the efforts of the Sub-Commission to prepare this draft and appreciates that the draft international convention contains many of the recommendations which the Working Group for many years has submitted to the Commission on Human Rights and Governments.

The draft international convention is a very comprehensive and carefully drafted document based on, but at the same time clearly going beyond, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 and the Declaration on the Protection of All Persons from Enforced Disappearance of 1992 (the Declaration). It consists of a preamble and three parts. Since the Working Group agrees with the general approach and most provisions of the draft international convention, it will restrict its comments only to those provisions which merit its attention.

Part I contains the substantive provisions and focuses primarily on the individual criminal responsibility of the perpetrators of forced disappearance, as well as on obligations of States parties to prevent such crime. While the preamble recognizes, similarly to article 1 (1) of the Declaration, that any act of forced disappearance constitutes an 'offence to human dignity', article 3 (1) stipulates that the systematic or massive practice of forced disappearance constitutes a 'crime against humanity'. This change as compared to the Declaration correctly takes into account recent developments in international law, notably the Inter-American Convention on Forced Disappearance of Persons of 1994 and the Rome Statute of the International Criminal Court of 1998, both of which should, in the opinion of the Working Group, be referred to in the preamble.

The principle of universal jurisdiction (art. 6 (1) (b) in conjunction with articles 7 and 13) is drafted in a much clearer manner than in comparable treaties, including the Convention against Torture. Some provisions of Part I seem somewhat repetitive, as e.g. the obligation of States parties to grant their investigating authorities full access to places where victims of forced disappearance might be held, to be found in articles 11 (4), 20 (2) and 21 (6).

The principle of non-refoulement in article 15 seems to go beyond existing international law by prohibiting the expulsion or extradition of a person to a State where forced disappearance or 'any other serious human rights violation' might be inflicted on him or her. This expression seems fairly vague and might be interpreted to include also violations of human rights, such as personal liberty, freedom of expression or procedural and other guarantees presently not covered by the non-refoulement principle.

The Working Group particularly welcomes the obligation of States parties pursuant to article 18 to prevent and punish the abduction of children whose parents are victims of forced disappearance and of children born during their mother's disappearance. Together with the general rule of returning such children to their family of origin, the explicit possibility of annulling any adoption which has arisen from a forced disappearance, and the principle of the best interest of the child taken from the Convention on the Rights of the Child, this obligation provides an appropriate remedy to one of the most serious phenomena in the context of forced disappearances.

In article 22 (5), the draft international convention stipulates the obligation of States parties to establish competent national authorities to carry out preventive visits to places of detention, similar to those envisaged in the European Convention for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment of 1987 and the draft Optional Protocol to the United Nations Convention against Torture. The Working Group proposes that such regular visits shall be carried out by national authorities which are not only competent but also independent from the executive branch.

Finally, the Working Group wishes to express its concern at the formulation used in article 23. What does it mean that States parties shall guarantee that detainees are released 'in condition in which their physical integrity and their ability fully to exercise their rights are assured'?

Part II contains the international monitoring provisions, i.e. the establishment of a Committee against Forced Disappearance and its task to carry out five different monitoring tasks: the examination of State reports, of inter-State and individual communications, as well as the carrying out of the inquiry and tracing procedures.

The Working Group remains doubtful about the wisdom of creating a further treaty monitoring body. It would have preferred if these tasks were assigned to one of the existing treaty monitoring bodies, in particular the Committee against Torture or the Human Rights Committee. If one, however, wishes to create another body, one should take into account the negative experience of bodies with only 10 members, such as the Committee against Torture or the Committee on the Rights of the Child. The respective provision in article 25 (1) should, therefore, provide for at least 18 members.

In the provisions regulating the nomination and election of committee members, the Working Group recommends not to exclude the possibility of States parties nominating persons who are not their own nationals. The combined reading of article 25 (2) and (5) leads to the unfortunate conclusion that an excellent committee member cannot be re-elected if his or her own Government (which might have changed in the meantime) refuses re-nomination. Similarly, article 25 (6), in the opinion of the Working Group, seems to put too much attention on the right of individual States parties to nominate or even 'appoint' their own experts. There is no reasonable justification why, in the event of death or resignation of a committee member, only the State of his or her nationality should have the power to nominate a successor.

The draft international convention does not establish optional procedures. On the other hand, article 36, which prohibits any reservation to Part I, seems to allow for a possibility of 'opting out' of four of the five procedures (not the tracing procedure in article 31), including the State reporting procedure in article 27. In other words: any State party could make a reservation to the establishment and procedures of the committee unless such a reservation 'would inhibit the operation of any of the bodies established by this Convention'. This rather peculiar provision is fairly unclear and needs further interpretation. In view of the highly sensitive nature of treaty body interpretation of the power of States parties to make reservations, the Working Group proposes to delete this provision in article 36 and prohibit reservations altogether. If, for political reasons, there should be a need for one or the other optional procedure, one should better state this in the respective articles.

The State reporting procedure in article 27 envisages only first (initial) and supplementary reports at the request of the Committee, i.e. rightly avoids the imposition of periodic reporting obligations. At the same time, it introduces the interesting idea of combining the examination of first reports with a visit to the country. The Working Group wonders why such a possibility is not envisaged for the examination of supplementary reports as well.

The inter-State communication procedure in article 29, notwithstanding minor improvements, still seems to follow the fairly inefficient model of articles 11 to 13 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 and articles 41 and 42 of the International Covenant on Civil and Political Rights of 1966. The Working Group cannot understand why one wishes, 10 years after the end of the Cold War, to reduce the powers of the committee to a mere arbitration and conciliation function, with only a brief final report on the facts and submissions of the States parties as envisaged in article 29 (h) (ii), rather than to authorize it to decide on the alleged violations as in the individual communication procedures or in comparable inter-State complaints procedures under the European Convention on Human Rights or relevant ILO treaties.

With respect to the individual communication procedure, the Working Group particularly welcomes the right of groups and non-governmental organizations to submit communications as stipulated in article 30 (1) and the power of the Committee, envisaged in article 30 (4), to organize hearings and investigative missions. The traditional United Nations terminology dating from the time of the Cold War ('communications' and 'views' rather than 'complaints' or 'petitions' and 'decisions') sounds, however, somewhat outdated in a human rights treaty of the twenty-first century.

Article 31 regulates the traditional tracing procedure as it is presently carried out by the Working Group. Although this procedure is primarily of a humanitarian nature as stipulated in article 31 (4), it may overlap or even come into conflict with the inquiry procedure in article 28. This is, however, a general problem which arises if one body is entrusted with both monitoring and humanitarian functions. The Working Group wishes to point out that it might be wise to specify whether this tracing procedure also applies to

international and non-international armed conflicts (in view of the special competencies of the International Committee of the Red Cross under the Geneva Conventions), as well as to disappearances allegedly carried out by non-State actors.

In conclusion, the Working Group wishes to reiterate its gratitude to the Sub-Commission for having prepared such an excellent draft and expresses its hope that the Commission on Human Rights will speedily finalize the drafting process. It welcomes the idea of the Commission, as expressed in paragraph 9 of its resolution 2000/37 of 20 April 2000, setting up an inter-sessional working group in charge of considering and finalizing the draft convention. Members of the Working Group are, of course, happy to make their expertise available to this inter-sessional working group if so requested by the Commission.

The Chairman of the Working Group wishes to add his personal opinion that in view of the highly political nature of forced disappearances, he considers the strengthening of the Working Group as the relevant thematic mechanism of the Commission on Human Rights as more efficient than adopting another legally binding human rights treaty with quasi-judicial monitoring procedures."

Annex III

COMMENTS AND INFORMATION PROVIDED BY
NON-GOVERNMENTAL ORGANIZATIONS

A. International Committee of the Red Cross

[Original: English]

By letter dated 31 October 2000, the Deputy Head of the Legal Division of the International Committee of the Red Cross (ICRC) transmitted the following comments:

"In our view, the text of the draft convention provides a solid starting point for discussions on the development of an international legal framework aimed at deterring and putting a stop to the practice of enforced disappearance. Many reasons could be enumerated in support of elaborating the text of such a convention, among which is the fact that there is currently no universally binding international instrument on enforced disappearances, even though the practice continues unabated in many parts of the world.

Moreover, existing international treaties - while dealing with some aspects of the phenomenon - fail to comprehensively address the obligation of States to prevent, investigate and punish acts constituting enforced disappearance and requiring international cooperation in the fight against this practice.

Finally, the Rome Statute of the International Criminal Court prohibits enforced disappearances when committed on a 'widespread or systematic basis' as a crime against humanity, but does not address instances of enforced disappearance that do not cross that threshold.

ICRC believes that an international convention on enforced disappearances could be complementary to its almost daily efforts to prevent and stop this practice in situations of armed conflict. One of the issues that could be addressed in further work is how to establish a link between the text of the draft convention and the corresponding provisions of international humanitarian law and the ICRC mandate in the application of this body of law.

ICRC believes that the establishment of an intersessional working group to consider the text of the draft convention would be a good way of moving the debate forward expediently. We look forward to working constructively with the intersessional working group if and when a decision on its creation is reached."

B. American Association of Jurists

[Original: Spanish]

By letter dated 4 October 2000, the American Association of Jurists provided the secretariat with the following comments, prepared on 24 December 1998:

"Article 1. Paragraph 2 of this article unduly extends the scope of forced disappearance, which is a specific penal offence defined in paragraph 1, to other completely different offences, such as criminal kidnappings, committed by individuals, which are covered in national penal legislation. Paragraph 2 should be deleted, since it tends to attenuate the specific nature of the offence addressed in the draft (forced disappearance is brought about by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State).

Article 2, paragraph 1. For the sake of clarity, it would be preferable to refer to a 'constituent act' rather than a 'constituent element'. The phrase 'given the circumstances of the case' should be added after 'ought to have known', so that the liability arising from the first part of the sentence rests on objective elements.

Subparagraph (a): encouragement is covered by the term 'incitement', which is an independent act consisting in generic incitement to commit offences, not to commit a specific offence. When referring to a specific offence (in this case the forced disappearance of persons), it is preferable to use the term 'instigation'. The references to 'incitement or encouragement' should therefore be deleted from the subparagraph.

Article 3. Whether a crime constitutes a 'crime against humanity' depends on the gravity of the crime in itself and not on its 'systematic or massive practice'. In other words, the distinction established in article 3 does not make sense. This article should be deleted or should be changed to read simply: 'Forced disappearance of persons constitutes a crime against humanity'.

Article 4, paragraph 1 (a). The fact that States ought not to practise, permit or tolerate offences is obvious. Subparagraph (a) should be deleted accordingly.

Article 5. The part of the article that draws a distinction between forced disappearance as defined in article 1 and that defined in article 3 should be deleted, since, as was observed under article 3, this distinction is pointless.

Article 6. This article fails to refer to the power of States to establish jurisdiction in cases where the accused or the victim are nationals of that State, regardless of whether the accused is in the territory of the State or not, as established in many national legislations, in the Inter-American Convention on the Forced Disappearance of Persons and in the Convention against Torture. It was precisely on the basis of this provision, which has been omitted from the draft, that the Argentine Captain Astiz could be tried and sentenced in absentia in France and that proceedings were being held in Spain, Italy and other countries against Pinochet and against Argentine military staff.

A provision similar to that contained in article IV (b) and (c) of the Inter-American Convention and article 5 (c) of the Convention against Torture should be added to this article.

Article 7. The phrase 'take all necessary measures to ensure the continued presence of that person in the territory and if necessary' should be deleted, since the only effective way of ensuring the presence of the suspect is to take him or her into custody.

Article 16. This article should be amended in the light of the comments made regarding articles 3 and 5. The crime of forced disappearance is not subject to statutory limitation insofar as forced disappearance is considered to be a crime against humanity. If not, the periods of limitation should be calculated as indicated in the second part of paragraph 2 of the article.

Article 17. Paragraph 2 does not make sense. The seriousness of the offence should be taken into account for the purposes of adjusting the application of a penalty. Pardon is not adjustable: it is either granted or not granted. This paragraph should say: 'In view of the seriousness of this offence, no pardon shall be granted to its perpetrators'.

Article 18, paragraph 1. It is an obvious fact that States must prevent the perpetration of offences and must punish those which have been perpetrated. This paragraph should read:

> 'States parties shall take all necessary and appropriate steps to search for and identify children whose parents are victims of forced disappearance and children born during their mother's forced disappearance who are presumed to have been abducted by third parties. The child will be returned to his or her family of origin ("as a general rule" to be deleted). In the event of rightful adoption, the child may be allowed to remain with its adoptive family, subject to the consent of the child and the family of origin.'

Paragraph 3 of the article should be amended in the light of the comments made with regard to paragraph 1, that is, allowing rightful adoptions to be confirmed with the child's consent and that of the family of origin.

In conclusion, the draft has its good points, but also shortcomings, in terms of legal technicalities and substance. It should be revised by a specially constituted working group."

C. Amnesty International

[Original: English]

By letter dated 26 October 2000, the Deputy Secretary-General of Amnesty International provided the secretariat with the following comments:

"Amnesty International considers it to be important that a strong convention text is adopted, especially since the number of enforced disappearances has not declined but has in fact risen significantly in a number of countries, notably Algeria and Burundi. The situation in Colombia remains critical.

The draft convention advances the international protection of victims of 'disappearances' and provides a comprehensive and integral approach to the problem. It incorporates important means to remedy 'disappearances' which have not been covered in existing human rights instruments. For example, the draft convention provides detailed rules against 'disappearance'. It seeks to combat impunity for 'disappearances' by listing enforced disappearance, its instigation, conspiracy to commit the crime of 'disappearance', and failure in the obligation to investigate, prevent and punish 'disappearances' as crimes subject to universal jurisdiction. Its systematic or massive practice is treated as a crime against humanity. Furthermore, the draft convention establishes concrete obligations for States to prevent 'disappearances' and to impose sanctions under their national legislation. The draft convention also creates a mechanism to monitor implementation of the convention and to deal with communications by individuals or groups. Moreover, the draft convention requires States to make the abhorrent practice of abducting the children of persons who have 'disappeared' a specific criminal offence, and specifically welcomes the right to reparation of the victims of 'disappearance'.

Amnesty International attaches the greatest importance to the early adoption of a strong text which incorporates all the above elements. It underlines the need to establish an inter-sessional working group, with wide and active participation of IGOs, NGOs and relevant experts who can contribute to the debate to ensure that this important international instrument is adopted in a form which provides the strongest protection to victims and potential victims of 'disappearances'."

D. Association of Families of Prisoners and Disappeared Saharans

[Original: Spanish]

By letter dated 26 October 2000, the Chairperson of the Association of Families of Prisoners and Disappeared Saharans (AFAPREDESA) transmitted the following comments:

"We are very hopeful that the Commission on Human Rights will adopt, as soon as possible, the convention on enforced disappearances. In the view of AFAPREDESA, the adoption of that convention will undoubtedly help to banish almost completely the crime of enforced disappearance, which has caused so many victims and so much anguish for years, in total impunity.

The United Nations now has an unprecedented opportunity to fight effectively against the cruel and degrading acts that have marked the end of the millennium. This is the only way of allowing human beings to feel protected from this internationally condemned practice. Having examined the draft convention on enforced disappearance in detail, AFAPREDESA fully endorses its contents so that all people may have recourse to an effective mechanism in the struggle against the horrendous crime of enforced disappearance.

We also appeal to all States to endorse the convention, which constitutes a historic step in the fight totally to eliminate enforced disappearances."

E. Latin American Federation of Relatives of Disappeared Persons

[Original: Spanish]

By letter dated 27 October 2000, the President of the Latin American Federation of Relatives of Disappeared Persons (FEDEFAM) provided the secretariat with the following comments:

"As a regional organization comprising 19 associations of relatives of disappeared detainees in 11 Latin American countries, FEDEFAM has been one of the main creators and promoters of the draft convention currently under consideration by the Commission on Human Rights. In the regional sphere, during the 1980s and 1990s we pressed for, and achieved, the adoption of a regional instrument on the same subject: the Inter-American Convention on Forced Disappearance of Persons, approved in Belém do Pará (Brazil) in 1994.

(a) The direct and personal commitment of the High Commissioner for Human Rights is essential in order to ensure that this instrument provides protection for victims. On the basis of our experience, we consider it vitally important that the High Commissioner should actively and personally participate in promoting this draft vis-à-vis the States Members of the United Nations, in order to ensure that the thousands of persons affected by this crime against humanity throughout the world have an effective means of protection, which today does not exist. This means that thousands of families remain in a state of complete legal and human defencelessness vis-à-vis those responsible for their suffering.

(b) A convention on enforced disappearance is an urgent necessity for mankind, inter alia, for the following reasons:

(i) Because of the continuation of this practice worldwide and the increase in the number of regions affected.

It is a fact that, far from being eradicated, enforced disappearances are continuing and have spread to a number of continents; they are motivated by various forms of discrimination, a fact which dramatically increases the number of victims and geographical regions affected.

According to the most recent report of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/2000/64), in 1999 the Group received 300 new reports relating to Algeria, Belarus, Brazil, China, Colombia, the Democratic Republic of the Congo, Ethiopia, Honduras, India, Indonesia, Iran (Islamic Republic of), Jordan, the Libyan Arab Jamahiriya, Mexico, Morocco, Nepal, Pakistan, the Philippines, Sri Lanka, the Sudan, Tunisia, Turkey and Uzbekistan. In addition, in Latin America during the year 2000, FEDEFAM has initiated urgent proceedings in an attempt to save the lives of persons reported to have disappeared in Guatemala and Peru.

In the case of Latin America, several of the victims of the reported disappearances are human rights defenders or relatives of disappeared persons belonging to FEDEFAM who have been persecuted for persistently seeking their loved ones, denouncing these crimes or instigating judicial investigations aimed at discovering the perpetrators.

According to United Nations reports and complaints filed by organizations of affected persons in other areas, such as Asia, Africa and the former Yugoslavia, enforced disappearances are currently perpetrated for various reasons, ranging from political motives to racial, ethnic or religious discrimination in internal armed conflicts or in international conflicts, even in nominally democratic regimes. The victims include men, women, children, whole communities comprising important social sectors, peasants, manual labourers, lawyers, students, professionally qualified persons, office workers, academics, clergymen and human rights defenders.

The complaints received by the High Commissioner's Office in Geneva reveal a pattern of enforced disappearances covering the whole world, and not just a few countries in Latin America.

(ii) Because no international treaty exists to protect the rights of the victims of enforced disappearances.

Although enforced disappearance has been recognized by customary international law, and recently by the Rome Statute of the International Criminal Court and the International Tribunals for the former Yugoslavia and Rwanda, and is recognized as a specific international crime, unfortunately there is as yet no treaty mechanism which categorizes the crime and independently protects its victims within the universal system, laying down obligations on States with regard to prevention, protection, punishment and international cooperation. Consequently, victims and relatives have no appropriate legal framework of protection covering the host of rights of which they have been deprived, including: the right to life, the right to recognition of legal personality - including the right to a name, the right to an identity and the right to civil status, the right to security of person, the right to the protection of the law, the right to truth, the right not to be arbitrarily deprived of one's liberty, the right of relatives not to suffer the permanent torture of not knowing the fate or whereabouts of their loved ones, and the right of women, children and men not to become disappeared persons; the right of children born in captivity to disappeared mothers not to suffer enforced appropriation; the right of children who disappeared with their father or mother not to be given for adoption; the right of relatives to have and keep without restriction the body of the disappeared person, the victim's right not to have his body or his identity concealed, the right of the relatives to grieve, and the right of access to effective justice and full redress.

(iii) Because the existence of a legally-binding instrument would effectively pave the way for the eradication of the persistent impunity surrounding enforced disappearance and would enable forceful preventive measures to be taken, such as categorization as a crime in national legislation and hence its prohibition and punishment - measures which are necessary for the effective eradication of this heinous practice.

As the Working Group on Enforced or Involuntary Disappearances has repeatedly stated, there are unfortunately few States which have promoted the inclusion of enforced disappearance in their criminal legislation, while some have only done so at the constitutional level, without removing the legal obstacles preventing the persons affected from securing justice on the basis of their right to be equal before the law.

(c) The Commission on Human Rights is requested, at its fifty-seventh session, to adopt an effective mechanism for the follow-up and study of the draft submitted for its consideration.

In the opinion of FEDEFAM, there is a compelling and immediate need to establish a flexible follow-up mechanism to ensure that the study of the draft convention is taken up with the requisite urgency. We accordingly request the High Commissioner and States members of the Commission on Human Rights, and particularly the Latin American States and members of the European Union, to reach a consensus on the establishment of an inter-sessional working group open to Governments, experts and NGOs to consider the draft convention and to promptly place before the Commission an agreed text for adoption. We trust that our comments will be circulated among States Members of the United Nations and that they will prove helpful when a position is adopted on the subject in the forthcoming deliberations of the Commission on Human Rights."

F. International Commission of Jurists, Human Rights Watch and International Federation of Human Rights

[Original: Spanish]

By letter dated 27 October 2000, the International Commission of Jurists, Human Rights Watch and the International Federation of Human Rights jointly transmitted to the secretariat the following information:

"The International Commission of Jurists, the International Federation of Human Rights and Human Rights Watch consider it of vital importance and indispensable that the United Nations should adopt an international convention to combat effectively one of the gravest human rights violations, namely the enforced disappearance of persons. Our organizations also consider that the draft international convention on the protection of all persons from enforced disappearance incorporates the main obligations and provisions which a convention on this issue should contain. Furthermore, our organizations consider that the Commission on Human Rights should establish, at its next session (2001), an inter-sessional working group to consider the draft convention on the protection of all persons from enforced disappearance (referred to hereinafter as the convention) as a matter of priority.

(a) Forced disappearance, as 'an offence to human dignity' and 'a grave and flagrant violation of ... human rights' and as an offence under international law, is a phenomenon which the international community absolutely must combat and eradicate, equipping itself with the necessary international legal instruments for the purpose.

Forced disappearance is not practised exclusively in any one region of the world, nor is it a phenomenon of the past. On the contrary, forced disappearance is practised in many countries of Africa, Asia, Latin America, Europe (former Yugoslavia) and the Middle East. It has been observed that forced disappearances in many countries are not part of a systematic or massive practice (crime against humanity).

Forced disappearance is a multiple violation of human rights, which is extended in time, whence its permanent or continuous nature. Forced disappearance violates: the right to security of the person, the right to the protection of the law, the right not to be deprived arbitrarily of liberty, the right of any human being to recognition as a person before the law, and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. Forced disappearance also puts the right to life in grave danger, when it does not - as is frequently the case - violate it altogether, and infringes the relatives' right to know the fate and whereabouts of the disappeared person.

One of the most serious characteristics of forced disappearance is that the practice removes the individual from the protection of the law, so that the enjoyment of all the individual's rights is suspended and the victim remains totally defenceless.

But forced disappearance is not the mere arithmetical sum of human rights violations; its practice - whether or not it is systematic or massive - generates a climate of terror both within the family circle of the victim and in the communities to which the disappeared person belongs.

Despite the extreme gravity of forced disappearance, the responses provided by existing international instruments are insufficient. Thus, although most of the rights violated in the event of forced disappearance are protected by the International Covenant on Civil and Political Rights, the Covenant does not establish specific obligations regarding the prevention, investigation and repression of the practice of forced disappearance and international cooperation required to combat and eradicate it. The Declaration on the Protection of All Persons from Enforced Disappearance, while stipulating several of these obligations, is not a legally binding instrument. The Rome Statute of the International Criminal Court addresses only one aspect of forced disappearance, namely international repression of this criminal practice when committed 'as part of a widespread or systematic attack directed against any civilian population', that is, when it constitutes a crime against humanity. But the Rome Statute does not address the problem of forced disappearance when it is not a crime against humanity, nor does it establish specific obligations concerning the repression of forced disappearance on a domestic level.

For these reasons, the International Commission of Jurists, the International Federation of Human Rights and Human Rights Watch are fully convinced of the need to adopt a convention on forced disappearance which will address the phenomenon in all its dimensions and which clearly establishes the obligations of States in terms of prevention, investigation, repression, reparation and international cooperation.

(b) The draft convention addresses basic aspects concerned with prevention, repression and eradication of the practice of forced disappearance which reflect the development of international law and the jurisprudence and doctrines of international bodies.

The draft convention establishes a definition of forced disappearance which covers both agents of the State and agents acting indirectly for the State (art. 1) and which extends to other acts such as instigation, incitement, encouragement, conspiracy, collusion,

concealment, attempted forced disappearance and non-fulfilment of the legal duty to act to prevent a forced disappearance (art. 2). According to the draft convention, forced disappearance in addition constitutes a crime against humanity when it is part of a systematic or massive practice (art. 3).

Where prevention is concerned, the draft convention contains precise provisions regarding deprivation of liberty and places of detention (arts. 21 and 22), investigation and search for disappeared persons (art. 11), legal remedies (art. 20) and non-refoulement (art. 15).

The draft convention establishes clear, specific obligations with respect to repression, such as: the obligation to define disappearance as an independent, permanent offence (art. 5), the obligation to exercise territorial and extraterritorial jurisdiction (art. 6) and obligations with respect to cooperation, mutual assistance and extradition (arts. 7, 12 and 13).

Furthermore, the draft convention establishes major safeguards against impunity, with regard to amnesties and similar measures (art. 17), asylum and refuge (art. 14), due obedience and criminal responsibility of hierarchical superiors (art. 9), statutory limitations (art. 16) and the competence of courts to judge persons suspected of offences of forced disappearance.

The draft convention addresses the serious phenomenon of the appropriation and abduction of the children of 'disappeared' parents, which had never yet been covered by international legislation. Thus the draft convention establishes the obligation to prevent and punish the abduction of children whose parents are victims of forced disappearance and of children born during their mother's forced disappearance; the return of children to their families of origin as a general rule, while taking account of the best interests of the child; the obligation of international cooperation and reciprocal assistance in the search for, identification, location and return of such children; and the obligation to establish in national law the possibility of reviewing adoptions and annulling any adoption arising from a forced disappearance (art. 18).

Lastly, the draft convention establishes a broad definition of the victim of the offence of forced disappearance (art. 24), the obligation to provide reparation for the damage caused by forced disappearance (art. 4) and safeguards guaranteeing the rights to justice and truth for the relatives of disappeared persons (arts. 10 and 11).

(c) The International Commission of Jurists, the International Federation of Human Rights and Human Rights Watch consider that the Commission on Human Rights should establish an inter-sessional working group to consider the draft convention as a matter of priority. Since a draft convention is involved, this procedure would be the most appropriate for examining the text and arriving at agreements and consensuses. The composition of the working group should be broad-based and open in order to provide governments, experts and NGOs with full opportunity to express their views and comments.

Moreover, the conclusion of the work of the Working Group on the draft optional protocols to the Convention on the Rights of the Child should be considered by the Commission on Human Rights as propitious to the establishment of an inter-sessional working group to consider the draft convention, as indicated by the Sub-Commission on the Promotion and Protection of Human Rights in its resolution 2000/18 (para. 1)."

G. Social Justice Committee of Montreal

[Original: English]

By letter dated 23 October 2000, the non-governmental organization Social Justice Committee of Montreal made the following observations:

"Throughout its 25 years of work in partnership with Central American human rights and social organizations, the Social Justice Committee has become acutely aware of the urgent need for international action to end the crime against humanity constituted by the practice of enforced disappearance. This is an awareness that is derived not only from the reading of statistical reports on enforced disappearance but also from meetings with the family members of victims - people who are cruelly torn between mourning the probable murder of a loved one and hoping against hope that their beloved relative may still be alive.

In our human rights advocacy, we of the Committee have observed that the practice of enforced disappearance is often part of a pattern of systematic human rights violations taking place in a context of civil strife or, more recently, illicit drug production. However, its victims are rarely engaged in armed rebellion or in criminal activities. They are almost always social activists and human rights defenders or their families. It is therefore clear to us that enforced disappearance is used as a tool for the destruction of political dissent and social activism.

We are hereby respectfully requesting the United Nations to proceed to the immediate convocation of a special working group to draft an international convention on the protection of all persons against enforced disappearance. We would also urge you to do all that is within the power of the Office of the High Commissioner for Human Rights to ensure the speedy approval of this convention, so that it can become the essential point of reference in a concerted international effort to end the abhorrent practice of enforced disappearances."